

# UNIT 59 COMMERCIAL REMEDIES

## UNIT CERTIFICATION

### Statement of Completion

\_\_\_\_\_ has satisfactorily completed on-the-job training in the duty or duties of this Unit under the conditions described below and in accordance with the overall standard(s) for this Unit.

**Duties**

- Part A. Select a formal contract remedy.
- Part B. Issue a cure notice.
- Part C. Reject nonconforming supplies or services.
- Part D. Obtain redress under a warranty clause.
- Part E. Obtain redress under FAR 52.212-4 implied warranties (e.g., merchantability or fitness for a particular purpose).

**Conditions**

Given contracts with FAR clause 52.212-4, the contract file, evidence of performance problems, and documentation of informal attempts to resolve the problems. Note: For the purpose of training this Unit, do NOT use contracts with addenda to 52.212-4 that incorporate additional remedies (e.g., liquidated damages). Use contracts that incorporate commercial warranties; also use contracts with NO addenda that limit or replace the language at FAR 52.212-4(a) and 212--4(o).

**Overall Standard(s)**

Select the remedy that will best minimize the impact of contractor performance problems on performance, delivery, and cost. Obtain reasonable consideration for any relief granted the contractor from the contract's original terms and conditions. Document all decisions and contacts with the contractor sufficient to support the Government's position in disputes or court proceedings. Correctly follow prescribed procedures for the remedy.

### Evaluator for All Parts

\_\_\_\_\_  
Name

\_\_\_\_\_  
Title

\_\_\_\_\_  
Date

## UNIT 59 COMMERCIAL REMEDIES

DOCUMENTATION OF OJT ASSIGNMENT(S)	
Description of Assignment:	
Evaluation:	
Completion Date:	

*As needed, insert additional pages to record OJT assignments.*

# UNIT 59 COMMERCIAL REMEDIES

## Policies

<i>FAR</i>	<i>Agency Suppl.</i>	<i>Subject</i>
8.405-4		Remedies for problems with Federal Supply Schedule contractors.
12.208		Contract quality assurance.
12.213 & 12.302		Incorporating other remedies which are considered customary commercial practice.
12.402		Acceptance.
12.403		Termination for cause.
12.404		Warranties.
12.503		Inapplicable laws (i.e., inapplicable remedies).
22.1022 and 1023		Failure to comply with the Service Contract Act.
22.1307		Failure to comply with 52.222-35—Affirmative Action for Special Disabled and Vietnam Era Veterans
22.1407		Failure to comply with 52.222-36—Affirmative Action for Handicapped Workers
23.506		Failure to comply with requirements to maintain a drug-free workplace.
46.407		Nonconforming supplies
46.701, 46.702, 46.706, & 46.709		Warranties.
46.8		Contractor liability for loss of or damage to Government property resulting from post acceptance defects.
49.607		Delinquency notices.
52.212-4		Contract Terms and Conditions - Commercial Items
52.219-16		Liquidated damages for failing to comply with the subcontracting plan (if 52.219-16 was incorporated by an addendum to 52.212-4)/
52.222-26		Cancellation, suspension, or termination of the contract under FAR 52.222-26, “Equal Opportunity” (incorporated by reference if checked in FAR 52.212-5)
52.222-41		Withholding of payments and termination under FAR 52.222-41, “Service Contract Act of 1965, As Amended” (incorporated by reference if checked in FAR 52.212-5).
52.246-17 through 20		Warranty clauses.

# UNIT 59 COMMERCIAL REMEDIES

## Other KSA's

### 1. Knowledge of:

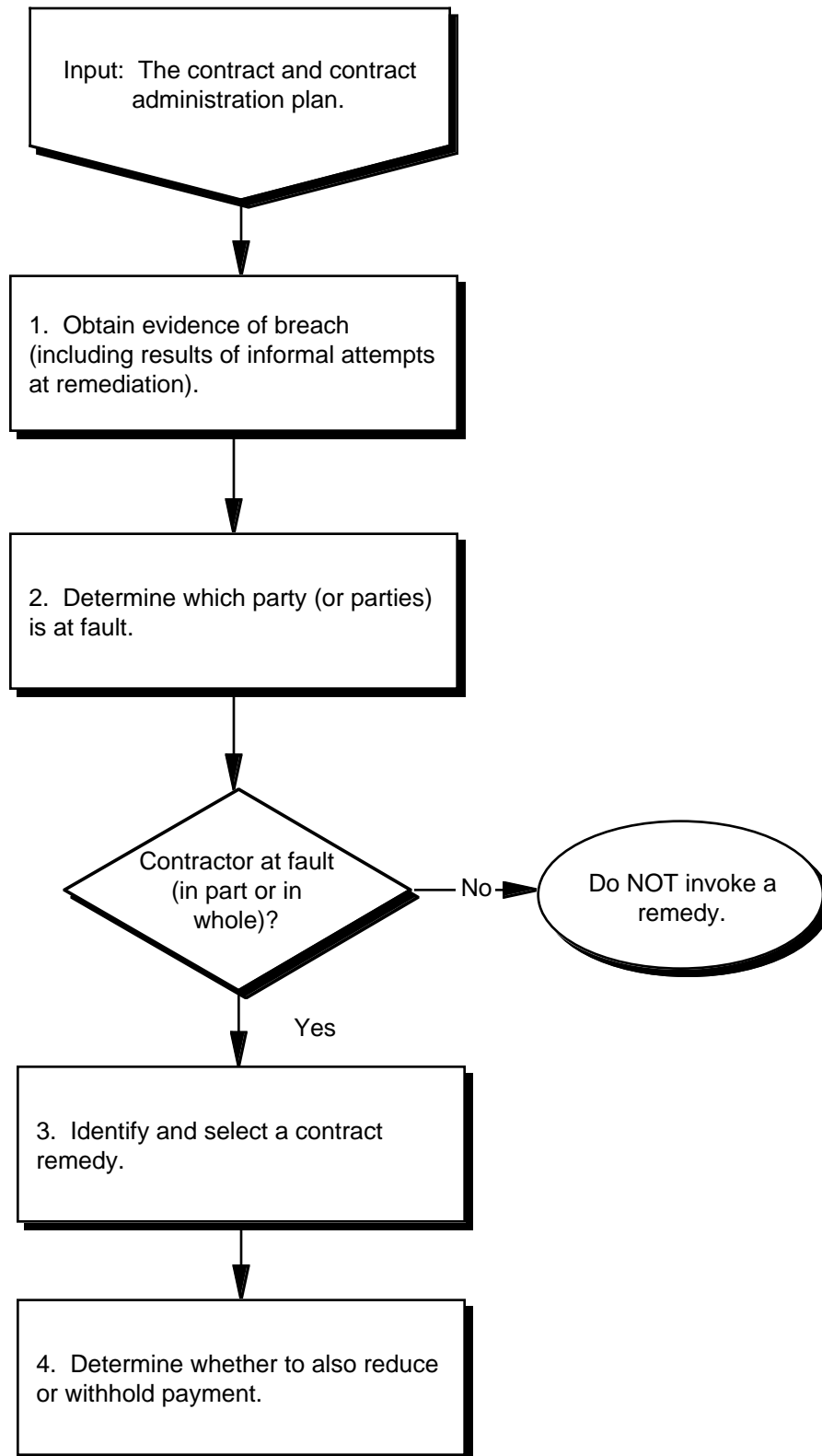
- The most likely procedural errors and skill at avoiding them.
- "Implied warranties" and the consideration owed the Government for breach of same.
- The purpose of liquidated damages clauses (as motivation, not as penalty).
- The possibility that the Government may lose some or all of remaining rights if it manifests acceptance of nonconforming acts. (It is now unreasonable to enforce these rights due to contractor reliance upon acceptance.)
- The possibility that continuing acceptance of "partial performance" will constructively modify the duty for substantial performance.
- Tests for invoking remedies.
- Examples of actual implied warranties and language that courts have ruled to be "puffing of the wares"

### 2. Commercial Law

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## Other Policies and References (Annotate As Necessary):

## Selection of Remedies



# UNIT 59 COMMERCIAL REMEDIES

## Part A. Selection of Remedies

### Tasks

### Related Standards

<p>1. Obtain evidence of any reported failure to perform or other breach (from Unit 56)</p> <ul style="list-style-type: none"> <li>• Anticipated or actual late delivery.</li> <li>• Failure to control costs.</li> <li>• Unsatisfactory performance.</li> </ul>	<p>A1. Collect all related facts, including the contractor's reactions to Government complaints.</p>
<p>2. Determine whether either of the parties (or both) is in noncompliance with contract requirements.</p> <p>Consider both:</p> <ul style="list-style-type: none"> <li>• Contract language.</li> <li>• Extrinsic evidence (e.g., contractor representations regarding the quality, condition, description, or performance potential of the deliverable).</li> </ul>	<p>A2. Correctly apply standards and rules for interpreting contractual language.</p> <p>If at issue, correctly determine whether contractor representations regarding the quality, condition, description, or performance potential of the deliverable were part of the "basis of the bargain", given the:</p> <ul style="list-style-type: none"> <li>• Price negotiation memorandum (what was said and contemplated during the negotiation).</li> <li>• The contractor's proposal, and</li> <li>• The contract itself.</li> </ul> <p>Correctly distinguish between express warranties and "mere puffing of the wares."</p> <p>Accurately verify that the Government has carried out its promises, duties, and responsibilities. For example:</p> <ul style="list-style-type: none"> <li>• Furnishing of suitable Government property at the specified time and place.</li> <li>• Implied duty to cooperate and not hinder performance.</li> <li>• Implied duty to disclose information vital for preparation of estimates or contract performance.</li> <li>• Implied duty to provide contractors with factually correct information (e.g., on applicable laws).</li> <li>• Implied warranty of specifications.</li> </ul> <p>Analyze potential contractor defenses:</p> <ul style="list-style-type: none"> <li>• Impracticability of performance.</li> <li>• Mutual mistakes.</li> <li>• Unconsonability.</li> </ul> <p>Identify and consider all potential Government defenses (e.g., disclaimers and exculpatory clauses; sovereign acts doctrine).</p>

# UNIT 59 COMMERCIAL REMEDIES

## Part A. Selection of Remedies

### Tasks

### Related Standards

<p>3. Identify and select one or more contractual remedies.</p> <ul style="list-style-type: none"> <li>• Cure notice.</li> <li>• Rejection of supplies or services before or after acceptance.</li> <li>• Remedies under a commercial Warranty clause (if incorporated as an addendum to 52.212-4).</li> <li>• Remedies under implied warranties (e.g., the warranty of merchantability, or the warranty of fitness for a particular purpose.)</li> <li>• Any other remedies provided in the specific clause that was breached.</li> <li>• None (e.g., acceptance of a minor nonconformance under FAR 46.407(f)).</li> <li>• Notice of termination for cause.</li> </ul>	<p>A3. Remedy(ies) best match the problem and reflect extent (if any) to which the Government is at fault. Issue a cure notice only when you have sufficient reason to terminate for cause — don't bluff. (see Unit 83).</p> <p>If the decision is to immediately issue a notice of termination for cause, go to Unit 83.</p>
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#### *Available Remedies in Contracts for Commercial Items*

➤ The clause at FAR §52.212-4, “Contract Terms and Conditions - Commercial Items”, provides the following remedies (expressly or implicitly):

- Rejection of non-conforming supplies or services before **or after** acceptance (§52.212-4(a))
- Redress for breach of the implied warranty of merchantability or fitness. (§52.212-4(o))
- Termination for cause. (§52.212-4(m))

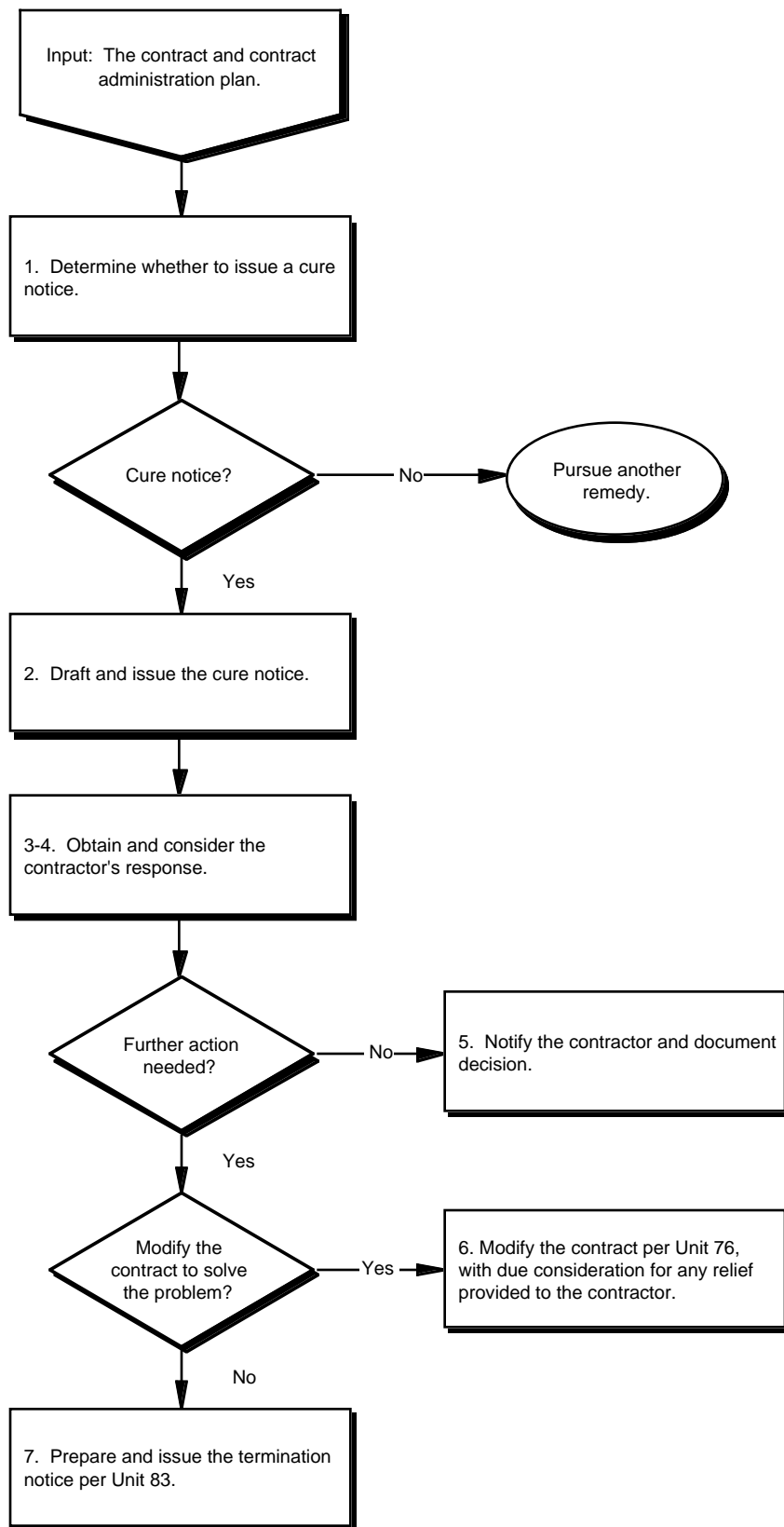
However, where consistent with commercial practice, contracting officers may tailor this clause with respect to terms and conditions for inspection and acceptance and warranties. In particular, the FAR encourages offerors to offer the Government at least the same express warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. [§12.402, 46.709, and §52.212-4(a), (m), and (o), FAC 90-32, Case 94-970]

#### *Consequential Damages*

➤ Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defects or deficiencies in accepted items. Before incorporating this waiver of consequential damages, ensure that it is consistent with customary practice of the particular industry. [§52.212-4(p), FAC 90-32, Case 94-970]

<p>4. Determine whether to reduce or withhold payment (per Unit 65).</p> <ul style="list-style-type: none"> <li>• Commercial finance payments under FAR 52.232-29(a) or 232-30(a)</li> <li>• Payment for deliverables.</li> </ul>	<p>A4. Withhold or reduce payment:</p> <ul style="list-style-type: none"> <li>• As provided in the contract for the remedy being invoked, or</li> <li>• To reflect any downward adjustment in the priced agreed to by the contractor.</li> </ul>
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# Cure Notice



# UNIT 59 COMMERCIAL REMEDIES

## Part B: Cure Notices

### Tasks

### Related Standards

1. Determine whether to issue a cure notice.	B1. Select the cure notice only if time remaining in the contract delivery schedule is sufficient to permit a realistic "cure" period of 10 days or more. Otherwise, prepare either a show cause or termination notice.
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#### *Cure Notice Requirement*

12.403(c)(1): "The paragraph in 52.212-4 entitled "Excusable Delay" requires contractors notify the contracting officer as soon as possible after commencement of any excusable delay. In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. The contracting officer shall send a cure notice prior to terminating a contract for a reason other than late delivery."

2. Draft and issue the cure notice.	B2. Prepare and issue the notice as provided in FAR 49.402-3 and 49.607. Must "make contractor aware of defects" (cure stops other remedies for 10 days).
3. Obtain contractor's response and determine the validity of any supporting data offered by the contractor (see Unit 56).  Examples of possible contractor responses: <ul style="list-style-type: none"><li>• Offer to "cure" performance.</li><li>• Offer to provide substantial performance in exchange for relief from some provisions of the contract.</li><li>• Case for excusable delay.</li><li>• Agree with the notice's facts and offer no solution.</li><li>• No response.</li></ul>	

# UNIT 59 COMMERCIAL REMEDIES

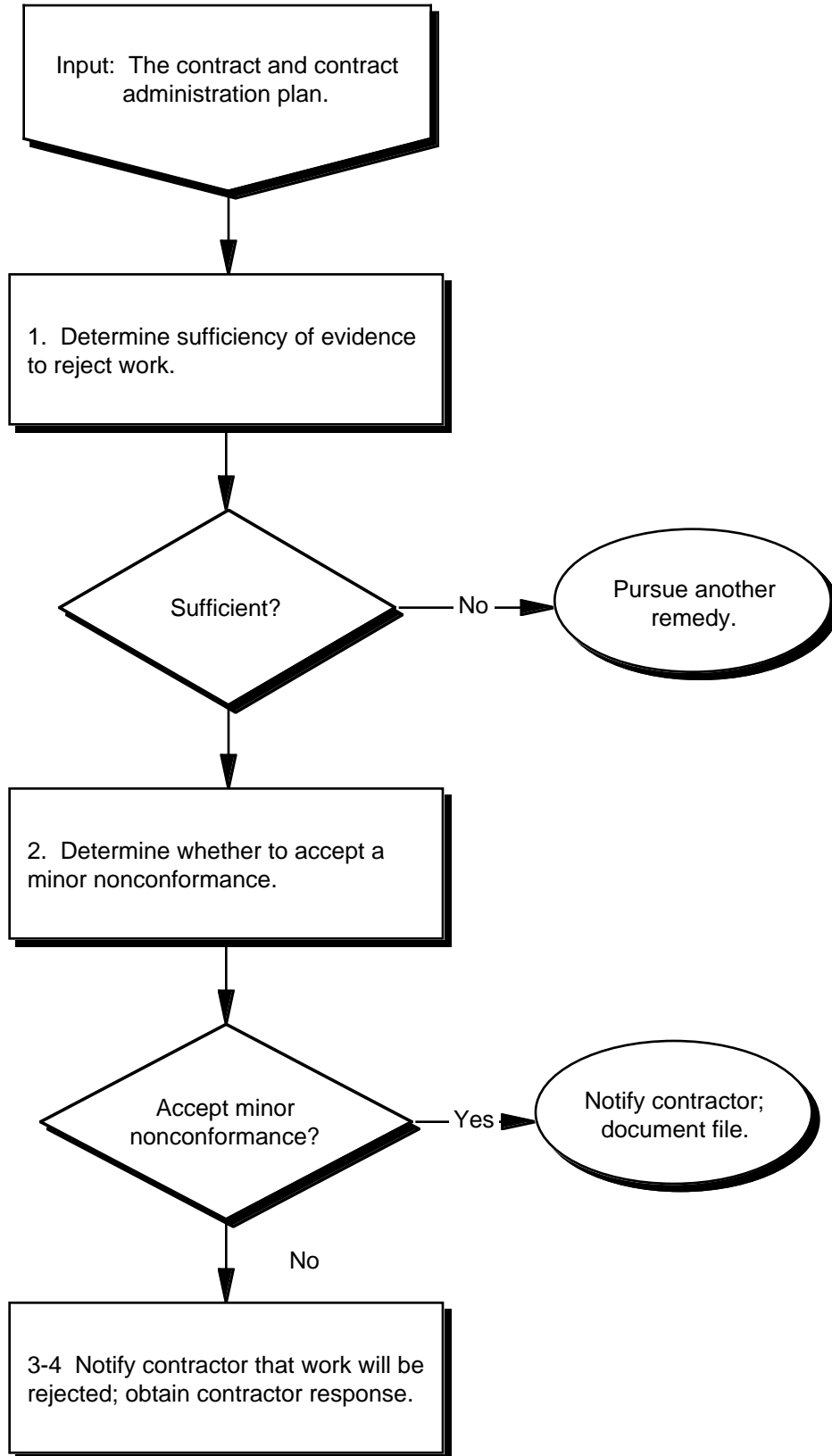
## Part B: Cure Notices

### Tasks

### Related Standards

<p>4. Determine the next step.</p> <p>Alternatives:</p> <ul style="list-style-type: none"> <li>• Take no further action,</li> <li>• Modify the contract, or</li> <li>• Begin proceedings to terminate for cause (see Unit 83).</li> </ul>	<p>B4. Take no further action only if the contractor provides sufficient evidence that performance will be "cured" within the delivery or performance schedule. Modify the contract only if the contractor provides sufficient evidence that the requirement will thereby be substantially met within a period of time acceptable to the requiring activity and with appropriate consideration for any relief from the contract's requirements. Do not agree to change the contract if such changes would substantially increase the Government's costs.</p>
<p>5. If the decision is to take no further action, provide written notice to the contractor and document a finding of facts.</p>	<p>B5. In the notice, state that:</p> <ul style="list-style-type: none"> <li>• The Government assents to the contractor's commitments to "cure" performance.</li> <li>• Assent is predicated on the contractor meeting the specified commitments.</li> <li>• Failure to fulfill the commitments made by the contractor to "cure" performance will restore the Government's right to terminate for cause.</li> </ul>
<p>6. If the decision is to modify the contract, implement the modification per Unit 76.</p>	<p>B6. In modifying the contract:</p> <ul style="list-style-type: none"> <li>• Establish the Government's position on consideration, a new delivery schedule, and other terms and conditions.</li> <li>• Negotiate sufficient consideration for relief from terms and conditions.</li> <li>• Execute a supplemental agreement.</li> <li>• Document a finding of facts. <ul style="list-style-type: none"> <li>- Alternatives considered.</li> <li>- Consideration received and justification for the amount.</li> </ul> </li> </ul>
<p>7. If the decision is to terminate the contractor for convenience or cause, implement the termination per Unit 83.</p>	

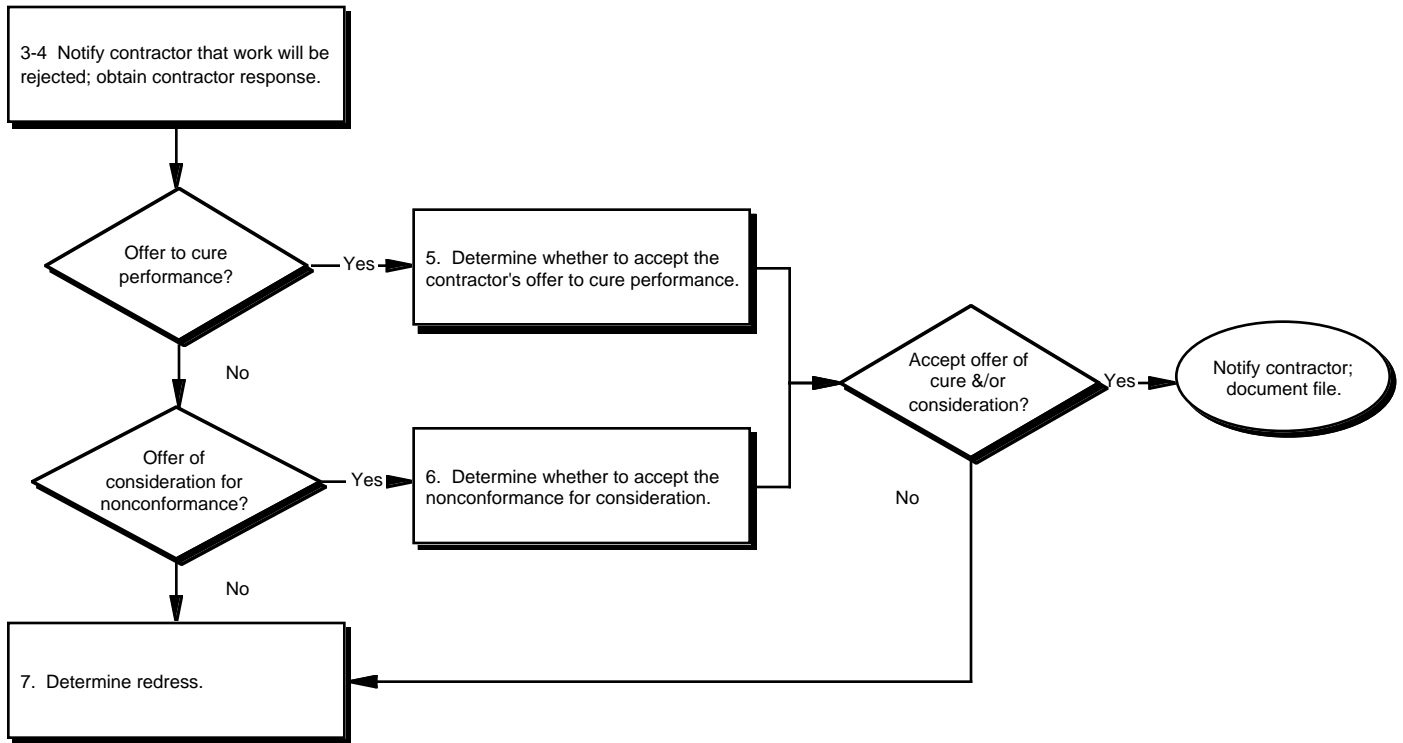
# REJECTING WORK



*(Flowchart continued on next page)*

# REJECTING WORK

*(Flowchart continued from prior page)*



# UNIT 59 COMMERCIAL REMEDIES

## Part C: Rejection of Work Under FAR 52.212-4(a)

### Tasks

### Related Standards

<p>1. Determine sufficiency of evidence to reject the work.</p> <p>Address such issues as:</p> <ul style="list-style-type: none"> <li>• Has the Government accepted the deliverable (either explicitly or implicitly by silence, late rejection, or retention and use of goods)?</li> <li>• Did the Government inspect the deliverable prior to acceptance? If so, was the defect patent (i.e., discoverable through inspection) or latent? Was fraud (or gross mistake amounting to fraud) the reason a discoverable patent defect survived inspection prior to acceptance?</li> <li>• Was acceptance predicated on the reasonable assumption that the non-conformity would be cured (discovery at time of acceptance)?</li> <li>• Was acceptance reasonably induced by the seller's assurances (no discovery at the time of acceptance)?</li> <li>• Is the Government estopped by reason of accepting nonconforming work under a prior contract for the same requirement?</li> </ul> <p>(Note: If the Government is at fault, options may include modifying the contract or terminating for convenience.)</p>	<p>C1. Correctly determine whether or not the Government has already accepted the deliverable.</p> <p>If the Government has accepted the deliverable, only consider revoking acceptance under FAR 52.212-4(a) if the Government has reported or will report the defect to the contractor:</p> <ul style="list-style-type: none"> <li>• Within a reasonable time after the defect was discovered or should have been discovered; and</li> <li>• Before substantial change occurs in the condition of the item, unless the change is due to the defect in the item.</li> </ul> <p>Correctly apply tests to determine sufficiency of the evidence and ensure that the Government is not at fault.</p>
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### *Rejection of Nonconforming Supplies or Services Before or AFTER Acceptance*

➤ §52.212-4(a) authorizes the Government to require repair or replacement of nonconforming supplies and reperformance of nonconforming services at no increase in contract price. However, the Government can exercise this authority **after acceptance** only if it acts:

- Within a reasonable time after the defect was discovered or should have been discovered; and
- Before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item

Unlike the more traditional inspection and acceptance clauses required for non-commercial contracts by FAR Parts 14 and 15, FAR §52.212-4(a) does NOT make acceptance final for patent defects. This is in keeping with the customary commercial practice of accepting items based on seller assurances rather than on buyer inspection. [§52.212-4(a), FAC 90-32, Case 94-970]

# UNIT 59 COMMERCIAL REMEDIES

## Part C: Rejection of Work Under FAR 52.212-4(a)

### Tasks

### Related Standards

<p>2. Determine whether to accept a "minor" nonconformance.</p>	<p>C2. Correct determine whether the non-conformance adversely affects the safety, health, reliability, durability, performance, interchangeability of parts or assemblies, weight, or appearance (where a consideration), or any other basic objective of the specification). Accept minor nonconformances without consideration as provided in FAR 46.407(e) and (f).</p>
<p>3. Prepare notice to the contractor of the Government's intent to reject the work.</p> <ul style="list-style-type: none"> <li>Identify reasons for rejection.</li> <li>Require the contractor to repair or replace the supplies or reperform the service at no increase in the contract price.</li> <li>Provide time (usually 10 days) to reply.</li> </ul>	<p>C3. Notice should meet the test of FAR 46.407(g). Accurately determine whether the Government's interest would be better served by "repair in place" or "removal of the supplies for repairs".</p>
<p>4. Obtain contractor's reply.</p> <p>Potential responses:</p> <ul style="list-style-type: none"> <li>Offer to "cure performance" (i.e., correct the work) and/or provide a downward price adjustment.</li> <li>Proposal that the Government accept the non-conforming supplies or services for consideration.</li> <li>Refusal to correct work or offer consideration.</li> <li>No reply.</li> </ul>	
<p>5. Determine whether to accept the contractor's offer to cure performance.</p> <p>Accept such an offer at no change in contract price if performance can reasonably be cured within the contract's delivery or performance schedule.</p> <p>If a cure is not possible within the delivery or performance schedule, determine whether to extend the delivery or performance schedule.</p> <p>If the decision is to extend the delivery or performance schedule, correctly determine:</p> <ul style="list-style-type: none"> <li>Reasonableness of the proposed extension.</li> <li>Whether to require consideration from the contractor and the amount of such consideration. If the contractor had reasonable grounds to believe that the deliverable was acceptable, do not require consideration for a reasonable extension of the delivery or performance schedule. Otherwise, obtain consideration.</li> </ul>	<p>C5. Accurately forecast whether a cure is probable within the delivery or performance schedule. Accurately identify and consider risks to the Government of extending the delivery or performance schedule. Develop a reasonable position on the length of any contract extension and consideration (if any) for extending the schedule.</p>

# UNIT 59 COMMERCIAL REMEDIES

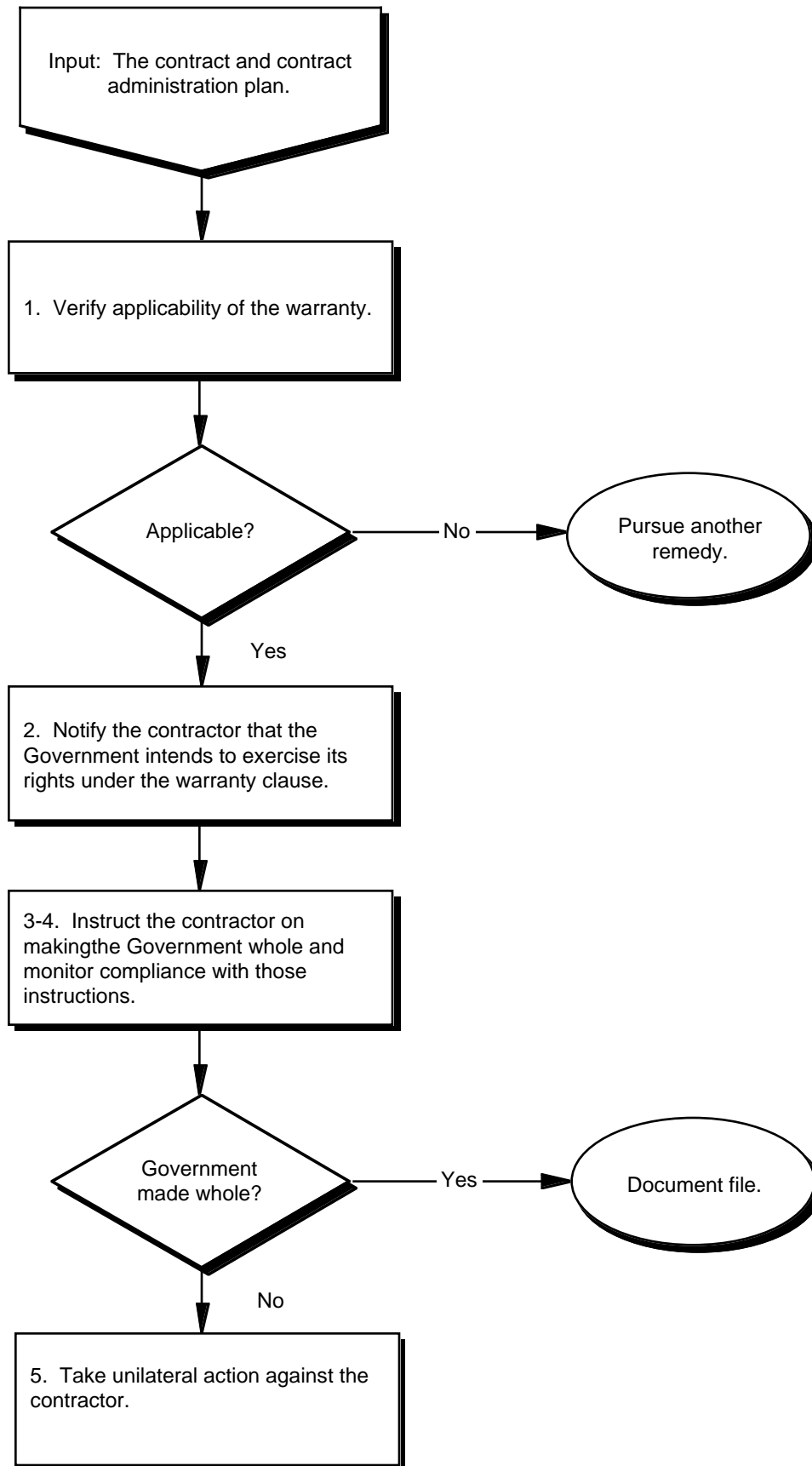
## *Part C: Rejection of Work Under FAR 52.212-4(a)*

### Tasks

### Related Standards

<p>6. Determine whether to accept nonconforming supplies or services given a contractor offer of consideration.</p> <p>Based the decision on:</p> <ul style="list-style-type: none"><li>• Advice of the technical activity that the deliverable is safe to use and will perform its intended purpose.</li><li>• Information regarding the nature and extent of the nonconformance.</li><li>• A request from the contractor for acceptance of the supplies or services (if feasible)</li><li>• A recommendation for acceptance or rejection, with supporting rationale, and.</li><li>• The contract adjustment considered appropriate, including any adjustment offered by the contractor.</li></ul>	<p>C6. Only accept nonconforming supplies when in the Government's interest. Before acceptance, obtain the concurrence of the requiring activity and, where health factors are involved, of the responsible health official of the agency. You may accept nonconforming supplies or services without consideration if the contractor is obliged by the terms of a written warranty to make any necessary repairs or corrections after acceptance at no cost to the Government.</p>
<p>7. Determine whether to initiate termination for cause.</p> <p>Initiate termination for cause if:</p> <ul style="list-style-type: none"><li>• The contractor refuses or is not likely to cure performance, and</li><li>• Offered consideration (if any) is not acceptable.</li></ul>	<p>C7. See Unit 83.</p> <p>If the contractor makes a persuasive case that there has been acceptance, or that the work is acceptable under the contract's terms and conditions, do not terminate for cause.</p>

# Warranty Clause



# UNIT 59 COMMERCIAL REMEDIES

## Part D: Warranty Clause

### Tasks

### Related Standards

<p>1. Verify that the warranty clause applies.</p> <p>Base the verification upon the:</p> <ul style="list-style-type: none"> <li>• Terms and conditions of the clause (e.g., duration of the warranty).</li> <li>• Government's obligations under the clause (have they been met?).</li> <li>• Factual basis for applying the warranty (do the facts support the Government's case for invoking the warranty?).</li> </ul>	
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#### *Express Warranties*

➤ When soliciting offers for commercial items, require (to the maximum extent practicable) offerors to propose at least the same warranty terms — including offers of extended warranties — customarily offered to the general public. You may specify minimum warranty terms, such as minimum duration, appropriate for the Government's intended use of the item. The question is whether the offered warranty protects the Government's interests at least as well as the implied warranties (especially if an express warranty disclaims the implied warranties). Any express warranty must meet the needs of the Government. Before accepting the proposed commercial warranty, question whether:

- The warranty is adequate to protect the needs of the Government, considering such matters as coverage and length of the warranty.
- The proposed terms can be effectively administered (including the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information).
- The warranty is cost effective. [§12.404, FAC 90-32, Case 94-970]

<p>2. Notify the contractor that the Government intends to exercise its rights under the warranty.</p> <ul style="list-style-type: none"> <li>• Prepare and send written notification of breach.</li> <li>• Obtain the contractor's position and supporting data.</li> <li>• Reach agreement on whether and how the Government is to be made whole.</li> <li>• Document results of contact.</li> </ul>	<p>D2. Provide written notice within the time constraints of the warranty clause. Accurately interpret the clause.</p>
<p>3. Formally instruct the contractor on how the Government is to be made whole.</p> <p>Alternatives:</p> <ul style="list-style-type: none"> <li>• Direction to repair, replace, or reperform (with further direction on whether the Government or contractor personnel will be responsible for identifying additional nonconforming deliverables for rework).</li> <li>• Retain supplies and unilaterally reduce the price.</li> </ul>	<p>D3. Provide written notice to the contractor with a reasonable period. Select the best alternative for making the Government whole available under the warranty clause, given the circumstances.</p>

# UNIT 59 COMMERCIAL REMEDIES

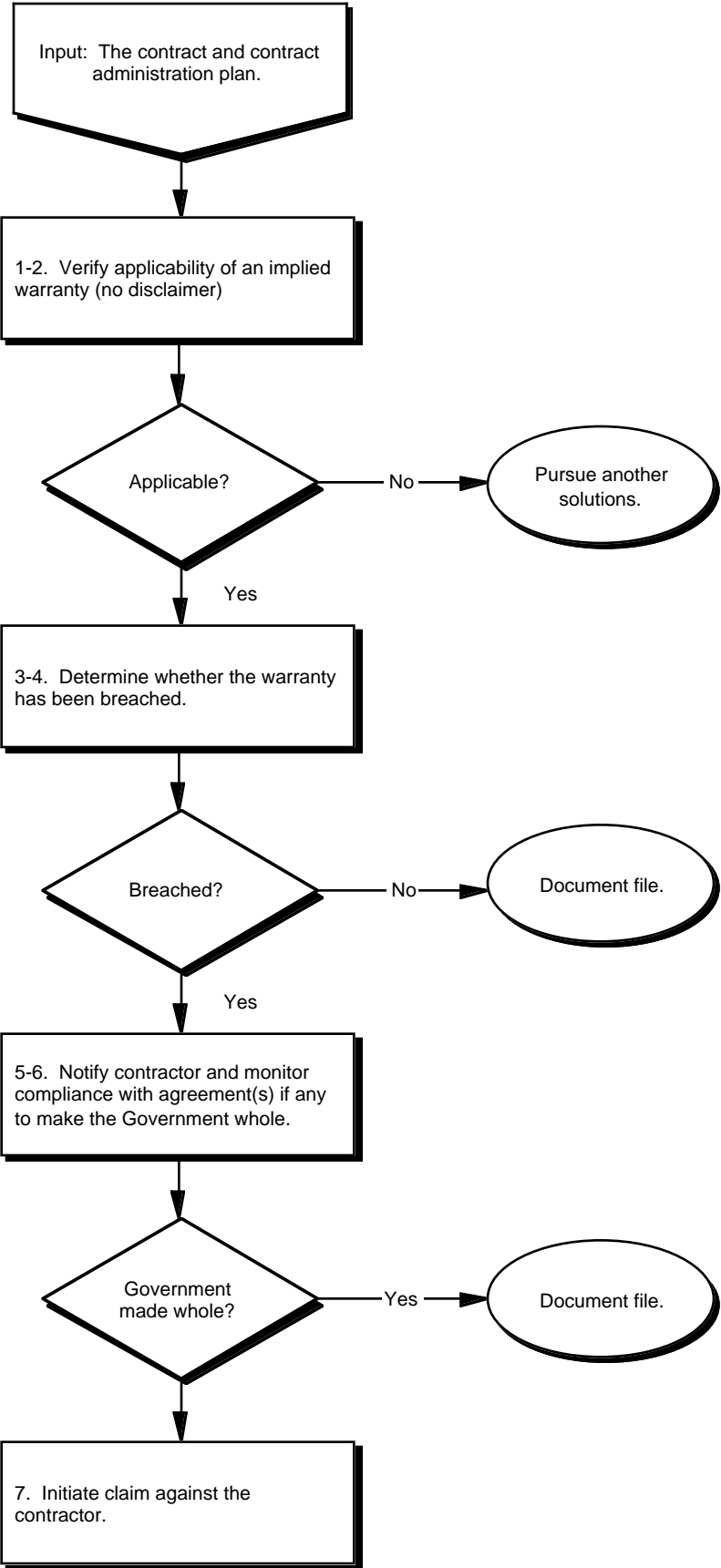
## *Part D: Warranty Clause*

### Tasks

### Related Standards

4. Monitor contractor compliance with instructions for making the Government whole.	D4. Ensure that the Government receives the full measure of relief provided by the warranty terms and conditions.
5. Take unilateral action against the contractor. <ul style="list-style-type: none"><li>• If allowed by the warranty clause, reprocure and charge back against the contractor (e.g., by offset).</li><li>• Otherwise, file a claim per Unit 81.</li></ul>	D5. If the contract has already closed out, file a claim as prescribed in Unit 81.

# Implied Warranties



# UNIT 59 COMMERCIAL REMEDIES

## Part E: Implied Warranties

### Tasks

### Related Standards

<p>1. Verify that the deliverable is covered by an implied warranty.</p> <ul style="list-style-type: none"><li>• Warranty of Merchantability.</li><li>• Warranty of fitness for a particular purpose.</li><li>• Other.</li></ul>	<p>E1. Consider invoking the warranty of merchantability or fitness for a particular purpose only:</p> <ul style="list-style-type: none"><li>• If the contract includes FAR clause 52.212-4, and</li><li>• The Government has not waived the warranty with respect to the defect at issue per UCC §2A-214.</li></ul> <p>Correctly identify other implied warranties (if any) incorporated by addendum to the contract.</p>
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#### *Warranties of Merchantability and Fitness for a Particular Purpose*

⌘ FAR §52.212-4(o) includes the warranties of “merchantability” and “fitness for a particular purpose”. These are two of the “implied warranties” in the Uniform Commercial Code (UCC). §52.212-4 does not incorporate other UCC implied warranties (e.g., the implied warranty arising from course of dealing or trade usage) — but a contracting officer by tailoring can incorporate such warranties where consistent with commercial practice. Likewise, the contracting officer can agree to terms that disclaim an implied warranties.

This is the first time that any UCC warranties have been recognized in the FAR. [§12.404 and §52.212-4(o), FAC 90-32, Case 94-970]

<p>2. Determine whether the contract disclaims the Government’s rights under FAR 52.212-4(o).</p>	<p>E2. If the contractor has accepted a purchase order (i.e., offer from the Government), correctly determine the legal effect (if any) of a disclaimer in the letter of acceptance. If the Government has accepted a contractor’s offer, correctly ascertain whether the resulting contract excludes or limits the Government’s rights under 52.212-4(o).</p>
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#### *Disclaiming the Implied Warranties*

⌘ Contractors may try to exclude or limit implied warranties contained in §52.212-4(o). Industry buyers often use purchase orders (i.e., make the offer) that explicitly or implicitly include UCC implied warranties. Sellers generally disclaim the implied warranties in their letters of acceptance. This is known as the “battle of the forms.” In such cases, courts invariably rule that the implied warranties stand and that disclaimers are NOT part of the contract. Hence, determine customary practice based on the contract — the terms of sale actually upheld by the courts. [FAR §12.404(b)(2)]


# UNIT 59 COMMERCIAL REMEDIES

## Part E: Implied Warranties

### Tasks

### Related Standards

3. If applicable, determine whether the warranty of merchantability has been breached.	E3. Correctly determine whether the item is or is not merchantable under UCC tests at §2A-212.
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 Under FAR §12.404, “merchantable” means that an item is reasonably fit for the ordinary purposes for which such items are used. The item must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description. [FAR §12.404(a)(1)]

The UCC at §2A-212 provides that goods are merchantable only if the goods —

- Pass without objection in the trade under the description in the contract.
- If fungible, are of fair average quality within the description.
- Are fit for the ordinary purposes for which goods of that type are used.
- Run, within the variation permitted by the contract, of even kind, quality, and quantity within each unit and among all units involved.
- Are adequately contained, packaged, and labeled as the contract may require.
- Conform to any promises or affirmations of fact made on the container or label.

The contractor has the following possible defenses under commercial law (UCC §2A-214):

- The warranty was specifically disclaimed in the contract, as tailored (e.g., by the terms of a commercial warranty clause incorporated as an addendum).
- The implied warranty is excluded or modified by course of dealing, course of performance, or usage of trade.
- The buyer agreed to a sale on an “as is” or “with all faults” basis.
- Before entering into the contract, the buyer examined the goods or a sample or model thereof as fully as desired, in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.
- Before entering into the contract, the buyer refused the seller’s demand that the buyer examine the goods (or a sample or model thereof), in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.

*The extent to which Boards of Contract Appeals and the courts will consider UCC language and precedents related to implied warranties is as of yet unknown. Past Boards have turned to the UCC for guidance in determining the Government’s post-acceptance rights where the Part 52 inspection and acceptance clauses were neither required nor incorporated in the contract (e.g., in response to claims by the Government with respect to items acquired through small purchase procedures for which no Part 52 inspection and acceptance clause was required or had been incorporated in*

# UNIT 59 COMMERCIAL REMEDIES

## Part E: Implied Warranties

### Tasks

### Related Standards

*the purchase order). Until the Boards rule otherwise, contracting officers probably should look to commercial law for guidance on this warranty.*

4. If applicable, determine whether the contractor has breached the warranty of fitness for a particular purpose.	E4. Correctly determine whether: <ul style="list-style-type: none"><li>• The seller knew the particular purpose for which the Government intends to use the item; and</li><li>• The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.</li></ul>
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#### *Fitness for a Particular Purpose*

➤ The warranty of fitness for particular purpose applies when—

- The seller knows the particular purpose for which the Government intends to use the item; and
- The Government relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose. [FAR §12.404(a)(2)]

The contractor has the following possible defenses under commercial law (UCC §2A-214):

- The warranty was specifically disclaimed in the contract, as tailored (e.g., by the terms of a commercial warranty clause incorporated as an addendum).
- The implied warranty is excluded or modified by course of dealing, course of performance, or usage of trade.
- The buyer agreed to a sale on an "as is" or "with all faults" basis.
- Before entering into the contract, the buyer examined the goods or a sample or model thereof as fully as desired, in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.
- Before entering into the contract, the buyer refused the seller's demand that the buyer examine the goods (or a sample or model thereof), in which case there is no implied warranty with regard to defects that an examination ought in the circumstances to have revealed.

5. Notify the contractor. <ul style="list-style-type: none"><li>• Send a letter of notification.</li><li>• Obtain the contractor's position and supporting data.</li><li>• Reach agreement with the contractor on whether and how the contractor will make the Government whole.</li><li>• Document results of contact.</li></ul>	E5. Act within a reasonable time after discovery of the breach (and within any deadlines established by the warranty clause). Negotiate acceptable relief (e.g., repair, replacement, or reperformance at no cost to the Government; refund of part or all of the purchase price).
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# UNIT 59 COMMERCIAL REMEDIES

## *Part E: Implied Warranties*

### Tasks

### Related Standards

6. Monitor contractor compliance with agreements (if any) to make the Government whole.	E6. Ensure that the Government is made whole (using the techniques of Unit 56)
7. Initiate a claim against the contractor.	E7. If the contract has already closed out, file a claim as prescribed in Unit 81. If the contract is still active, prepare a cure or termination (per Unit 83) notice.

# UNIT 59 — APPENDIX I

## SELECTING A COMMERCIAL CONTRACT REMEDY

PROBLEM	OPTIONS	COMMENT
<b>LATE DELIVERY</b>  Note: When the contracting officer has determined that the deliverable has been or will be delivered late and that the delay is non-excusable.	1. Reschedule the delivery date in exchange for consideration.	Appropriate when (1) there is a reasonably probability of delivery by the new date and (2) the requiring activity can live with the new date.
	2. Reduce or suspend commercial finance payments under FAR clauses 52.232-29(a) or 232-30(a)	Appropriate when (1) commercial finance payments are being made and (2) performance of the contract is endangered by the contractor's failure to make progress.
	3. Accept late delivery and impose liquidated damages. (Note: liquidated damages can be incorporated by addendum to FAR 52.212-4 if a customary commercial practice for the market. See Unit 60 for more details on liquidated damages).	Appropriate when (1) the contract provides for liquidated damages and (2) there is a reasonably probability of delivery by a date that the requiring activity can tolerate.
	3. Send a cure notice (10 days or more prior to the contract's delivery date) or a termination notice (immediately upon expiration of the delivery period).	When there is little probability of delivery by a date that the requiring activity can tolerate and/or the contractor has not offered adequate consideration.
<b>THE DELIVERABLE HAS NOT BEEN ACCEPTED AND DOES NOT CONFORM TO THE CONTRACT'S REQUIREMENTS</b>  Note: When the contracting officer has determined that the deliverable has not been implicitly or explicitly accepted and does not conform to contract requirements.	1. Accept the deliverable without consideration.	When the nonconformance is minor and obtaining consideration is not in the Government's interests (per FAR 46.407(f)).
	2. Accept the deliverable in exchange for consideration.	When the requiring activity can tolerate non-conformance (per FAR 46.407(c)).
	3. Accept the deliverable and invoke a warranty to have the deliverable brought up to specification after acceptance.	When the defect is covered by a warranty clause or an implied warranty (see FAR 52.212-4(o)) and immediate acceptance will benefit the requiring activity.
	4. Reject the deliverable and obtain correction or replacement at no cost to the Government.  Tell the payment office to withhold payment until an acceptable deliverable has been furnished.	When there is a reasonable expectation that a satisfactory replacement will be provided by the delivery date in the contract, or, for consideration, within a reasonable time thereafter (see option 1 under LATE DELIVERY).
	5. Reject the deliverable and send a cure or termination notice.	When there is little expectation of receiving an acceptable product within a reasonable time.

# UNIT 59 — APPENDIX I

## SELECTING A COMMERCIAL CONTRACT REMEDY

PROBLEM	OPTIONS	COMMENT
THE DELIVERABLE HAS BEEN ACCEPTED BUT DOES NOT CONFORM TO THE CONTRACT'S REQUIREMENTS	1. Reject work after acceptance as provided in FAR 52.212-4(a).	If the Government reports the defect to the contractor: <ul style="list-style-type: none"> <li>• Within a reasonable time after the defect was discovered or should have been discovered; and</li> <li>• Before substantial change occurs in the condition of the item, unless the change is due to the defect in the item.</li> </ul>
	2. Invoke an express warranty.	If a warranty clause has been incorporated by an addendum to 52.212-4.
	3. Invoke an implied warranty.	If an implied warranty applies (see FAR 52.212-4(o)).
OTHER BREACHES  Note: When the contracting officer has exhausted all efforts at informal resolution of the problem.	1. Invoke whatever remedy (if any) is established in FAR clauses (if any) incorporated by addenda or checked in 52.212-5.	Examples: <ul style="list-style-type: none"> <li>• Liquidated damages per FAR 52.219-16 for failing to comply with the subcontracting plan.</li> <li>• Cancellation, suspension, or termination of the contract under FAR 52.222-26, "Equal Opportunity" (incorporated by reference if checked in FAR 52.212-5).</li> <li>• Withholding of payments and termination under FAR 52.222-41, "Service Contract Act of 1965, As Amended" (incorporated by reference if checked in FAR 52.212-5).</li> </ul>
	2. Suspend or reduce payments under FAR 52.232-29 or 30.	When the supplies deliverable or services due under the contract will NOT be delivered or performed in accordance with the contract
	3. Send a cure notice (10 days or more prior to the contract's delivery date).	When the breach is of sufficient magnitude to warrant termination for cause.